Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers	)	GN Docket No. 94-33

REPLY COMMENTS OF AT&T CORP.

Mark C. Rosenblum
Robert J. McKee
Richard H. Rubin

Its Attorneys

Room 3254A2
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-4481

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SUMMARY

The comments demonstrate that the Commission should not make selective and arbitrary decisions about the regulatory status of CMRS providers based upon size. Such an exercise would be contrary to recent efforts to establish regulatory parity among all CMRS providers and could embroil the Commission in endless administrative processes.

The comments also show that the Commission correctly determined in the Second Report and Order that further forbearance is not warranted for Sections 210, 213, 215, 218, 219 and 220 of the Communications Act. In addition, Sections 223, 225, 227 and 228 all serve important public purposes and do not meet the test for forbearance under Section 332(c). Similarly, contrary to the claims of a number of commenters, enforcement of TOCSIA (except for the informational tariffing and mandatory OSP 800/950 number requirements) is necessary to provide consumers with important information and to protect them from unreasonable practices by CMRS providers who elect to provide operator services from aggregator locations. Forbearance of Section 226 would thus be contrary to the intent of Section 332(c), would injure consumers and competition, and would not serve the public interest.

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Pursuant to the Commission's Notice of Proposed Rulemaking,[1] AT&T Corp. ("AT&T") replies to the comments filed herein on June 27, 1994.[2] The comments respond to the NPRM's proposals regarding possible forbearance of Title II regulation for Commercial Mobile Radio Service ("CMRS") providers in addition to the forbearance ordered in the Second Report and Order in General Docket No. 93-252.[3]

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1 Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, Notice of Proposed Rulemaking, released May 4, 1994 ("NPRM").

2 A list of the commenters and the abbreviations used to refer to each is appended as Attachment A.

3 Implementation of Sections 3(n) and 332 the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, Gen. Docket No. 93-252, FCC 94-31 (released March 7, 1994) ("Second Report and Order").

I. THE COMMISSION SHOULD NOT MAKE ARBITRARY DECISIONS ABOUT CMRS PROVIDERS' REGULATORY STATUS BASED UPON SIZE.

A number of commenters representing "smaller" CMRS providers urge the Commission to make decisions on further forbearance by looking to factors such as the number of customers served,[4] the types of customers served,[5] and whether the provider reuses frequency.[6] In addition, some commenters, including larger providers like Nextel (pp. 5-6),[7] seek forbearance for "new entrants" in services such as Enhanced Specialized Mobile Radio ("ESMR"), even though Nextel acknowledges (id., p. 5) that ESMR "is the first real competitive choice in ten years to the duopoly cellular carriers." These proposals do not foster the regulatory parity which Section 332(c) was designed to create. This is particularly true for wide area SMR systems "that are substantially similar to cellular systems."[8]

AT&T does not believe any purpose would be served, especially at this time, by abandoning the regulatory parity

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[4] E.g., AMTA, pp. 7-9; Johnson, p. 5; U.S. Sugar, p. 9. See also Nextel, pp. 7-8.

[5] E.g., AMTA, pp. 9-10; Geotek, pp. 2-6. But see UTC, p. 2 (focus should be on size of licensee, not size of licensee's customers).

[6] Johnson, p. 6.

[7] See also Dial Page, p. 3.

[8] Johnson, p. 5. See also Pacific (p. 9), which notes that Nextel's Chairman has stated that Nextel's recent "alliance [with MCI] means that everyone else [in the PCS industry] will be playing catch up."

that has only been recently established in the Second Report and Order. As Bell Atlantic (p.1) notes, selective forbearance would "fragment the regulatory structure for CMRS and place competitors under different rules. And it would entangle the Commission in complex and unending monitoring of the CMRS industry, imposing an unwanted burden on both it and the industry." This concern is echoed by many other commenters, including BellSouth (pp. 2-6), which states that separate regulatory schemes for providers with specialized markets, a small customer base, and/or a limited operation would create significant regulatory burdens and "lead[] to a loss of time, money, and scarce Commission resources"[9] Establishment of separate regulatory regimes would also create incentives for parties to create "sham arrangements" in order to obtain lesser regulation.[10] Thus, no changes in the regulatory structure should be established based upon the size of a CMRS provider or its customers.

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[9] Id., pp. 5-6.

[10] Id., n.19. See also Pacific, pp. ii (disparate regulation would be an "administrative nightmare") and p. 3 (disparate regulation ignores that there is likely to be "an increased convergence" of mobile services); SBMS, p. 19 (reversion to "patch-work" regulatory approach would be unmanageable and require "constant oversight and adjustment").

II. SECTIONS 223, 225, 227 AND 228 SERVE IMPORTANT PUBLIC PURPOSES AND SHOULD NOT BE FORBORNE.

A. Section 223

The comments demonstrated that Sections 223, 225, 226, 227 and 228 serve important public purposes and should not be subject to further forbearance.[11] Thus, for example, the commenters generally agreed with the Commission's decision regarding Section 223, which provides consumers with protection against indecent communications. As AMTA (p. 10) recognizes, this provision "furthers the important public policy of protecting minors from indecent communications."[12] Thus, the Commission should adopt its

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[11] No party objects to continued application of Section 210; thus there is no reason to take an action on that section. In addition, most parties filing comments on the issue, even small providers, note that little would be gained by forbearing from applying Sections 213, 215, 218, 219 and 220 at this time (see e.g., CTIA, pp. 2-3; Dial Page. p. 4; GTE, p. 2; Nextel, p. 9). Even commenters who support (e.g., Johnson, p. 8) or are neutral (McCaw, p. 2) on forbearance for the latter provisions acknowledge that none of them impose affirmative obligations upon carriers. Pacific (pp. ii, 14-15), however, mistakenly asserts that the Commission could be sending "negative signals" to the industry about future regulatory action if it does not forebear from enforcing these provisions. The actions the Commission has already taken demonstrate that the reservations of authority in these sections merely serve to provide the Commission with an effective means to deal with possible abuses in the future. A decision not to apply further forbearance to these sections would not portend any desire to impose stricter regulation upon CMRS providers.

[12] See also CTIA, p. 4; Johnson, p. 8; GTE, pp. 4-5; McCaw, pp. 2-3; NABER, p. 7; Nextel, pp. 9-10; NYNEX, pp. 4-5; Southern, p. 5. But see Dial Page (n.7), which correctly notes that Section 223 would not apply to paging services, but fails to recognize the distinction between

(footnote continued on following page)

tentative conclusion and not forbear from applying this section of the Act to CMRS providers.

B. Section 225

Section 225 establishes carriers' duties with respect to Telecommunications Relay Services ("TRS"). This section serves the important public purpose of assuring that telecommunications services will be available for persons with hearing impairments. There was little disagreement among those who commented on the issue that the funding requirements of Section 225 impose minimal requirements and should not be forborne.[13] Those who object[14] argue that the administrative costs of contributing to the TRS fund may be high in proportion to the contributions of individual carriers, but there is no factual support for this assertion. Indeed, it should be insignificant for any carrier to determine its interstate revenues and apply the appropriate contribution factor. Moreover, any carrier with relatively small revenues can avoid virtually all

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(footnote continued from previous page)

services that are inherently a part of CMRS and the voluntary billing services that subject a carrier to affirmative duties under Section 223.

[13] AMTA, p. 13; CTIA pp. 5-6; GTE, p. 5; McCaw, p. 3; Nextel, p. 11; NYNEX, p. 5; Southern, p. 6; SBMS, pp. 7-10.

[14] E.g., Dial Page, pp. 6-7; Johnson, p. 10; OneComm, p. 9.

administrative expense by submitting the minimum annual contribution of $100.

Although most commenters agreed that CMRS providers should be required to provide TRS,[15] a few parties objected to that obligation. Some of them[16] argued that TRS services are not necessary because there has been little demand for such services from their customers. A current lack of demand, however, is not dispositive. Section 225 was adopted pursuant to the requirements of the Americans with Disabilities Act. The purpose of those two laws is to assure that hearing-impaired persons are not unfairly discriminated against, either in the use of telecommunications services, or with respect to employment opportunities that may require the use of such services. Thus, there is no basis to exempt CMRS providers from providing one of the alternative forms of TRS.[17]

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[15] CTIA, pp. 5-6; McCaw, pp. 3-4; Nextel, pp. 10-13; NYNEX, p. 5; Southern, pp. 5-6; SBMS, pp. 7-10.

[16] E.g., OneComm, p. 8; AMTA, p. 12; Geotek, pp. 7-8.

[17] See CTIA, pp. 5-6 ("providing TRS . . . impose[s] minimal burdens, even for small CMRS providers"). Dial Page (p. 6) and NABER (p. 7) imply there may be technical problems that could make it impossible for some CMRS providers to provide TRS services, but they offer no specific factual support. To the extent there are actual (as opposed to possible) technical problems for individual CMRS providers, the appropriate way to resolve such matters is though the use of a waiver petition (see Nextel, pp. 12-13 and n. 24), not by seeking forbearance of this important Congressional objective.

C. Section 227

Section 227 establishes restrictions on unsolicited telemarketing activities. No party has shown that forbearance of this section would meet the statutory requirements of Section 332(c).[18] This provision was specifically adopted to protect consumers from excessive unsolicited communications, and it will not apply to CMRS providers unless they make an affirmative decision to perform telemarketing functions. Thus the commenters[19] overwhelmingly support the Commission's tentative conclusion not to forebear from application of Section 227.

D. Section 228

Section 228 incorporates the Telephone Disclosure and Dispute Resolution Act ("TDDRA"). One of the express purposes of this statute is "to afford reasonable protection to consumers of pay-per-call services and to assure that violations of federal law do not occur."[20] Thus, even if

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[18] Forbearance is permitted under Section 332(c)(1)(A) only if a three-prong test is met. The three criteria are: (i) that enforcement of a provision of the Act is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with a service are just and reasonable and are not unjustly discriminatory; (ii) that enforcement is not necessary for the protection of consumers; and (iii) that specifying a provision for forbearance is consistent with the public interest.

[19] AMTA, p. 16; CTIA, p. 8; Dial Page, p. 8; Johnson, p. 8; GTE, p. 4; McCaw, pp. 2-3; NABER, p. 9; Nextel, p. 16; NYNEX, p. 6; Southern, p. 7.

[20] 47 U.S.C. § 228(a)(2).

application of Section 228 imposed costs upon CMRS providers, the Commission could not reasonably find that forbearance of TDDRA would be consistent with the requirements of Section 332(c)(1)(A)(i) or (ii).[21]

The NPRM (¶¶ 26-31) notes that Section 228 imposes three different types of obligations. First, it imposes duties upon carriers who assign 900 numbers to pay-per-call service providers. The NPRM (¶ 30) states that CMRS providers "do not have the ability to do this." Therefore, as NABER (p. 9) correctly states, CMRS providers are not bound by such duties unless they assign 900 numbers. If they do assign such numbers, however, there is no reason to relieve CMRS providers from the consumer-protection duties imposed upon all other carriers who perform similar functions. Similarly, as CTIA (p. 9) states, if CMRS providers choose to provide billing and collection services for pay-per-call providers, they should not be exempt from the duties imposed upon all other carriers who provide the same services.[22]

The NPRM (¶ 28) also notes that carriers who provide local exchange services are required, where technically feasible, to provide customers with a tariffed

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[21] See GTE, p. 4; McCaw, pp. 2-3. See also NYNEX, pp. 6-7 and Southern,, pp. 7-8, both noting that compliance with TDDRA would not impose unreasonable burdens.

[22] See also AMTA, pp. 17-18; Johnson, p. 9; NABER, pp. 9-10.

option that enables them to block access to 900 services. A number of commenters[23] urge the Commission to forbear completely from this requirement for CMRS providers. This would not be appropriate for carriers who choose to allow access to 900 calls over their services. Rather, as Nextel (p. 17) suggests, CMRS providers who are considered co-carriers with the local exchange carrier should be obliged to provide a blocking capability, and they should be excused from this requirement only if it is technically infeasible.[24] However, as Nextel (id.) notes, consistent with the Commission's decision in the Second Report and Order to forbear from applying Section 203, CMRS providers should provide such options to customers through their service contracts, rather than tariffs.

III. THE REQUIREMENTS OF TOCSIA SHOULD BE APPLIED TO ALL CMRS PROVIDERS.

Section 226 codifies the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"). AMTA (p. 15) acknowledges that carriers who "choose to provide operator services to the public should be subject to the same consumer protection statutes impacting other OSPs," and that "forbearance from Section 226 is not in the public

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[23] E.g., SBMS, pp. 16-17; AMTA, pp. 16-17. See also Johnson, p. 9 and NABER, pp. 9-10 (seeking designation that "small" CMRS providers are not local exchange carriers for purposes of Section 228).

[24] See also Southern, p. 7.

interest."[25] NYNEX (pp. 5-6) concurs that TOCSIA "protects consumers" and that "the public interest is best served by requiring all providers of CMRS to protect consumers from unreasonably high rates and anti-competitive practices such as those described in Section 226.[26]

Several commenters, however, assert that the Commission should completely forbear from applying Section 226 to CMRS providers.[27] Except for the informational

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[25] See AT&T, pp. 3-4. See also Dial Page, p. 8; and Johnson (n.11), which recognize that even "small" CMRS providers may become subject to TOCSIA if they choose to make services available when "there is no subscription relationship between the carrier and the customer." "Normal" subscription arrangements between CMRS providers and their customers, however, would not subject those carriers to TOCSIA. See Nextel, p. 14, OneComm, p. 10; Southern, p. 6. TOCSIA applies only when a carrier or aggregator voluntarily elects to make operator services available to the public. Carriers who find the burdens of TOCSIA to be uneconomic are free to withdraw from providing operator services or to seek a waiver under Section 1.3 of the Commission's Rules.

[26] CTIA (p. 6) also declares that selective exemptions of certain classes of CMRS providers from Section 226 would "contravene[] the statutory mandate and protection that Congress and the Commission already have determined should be afforded to consumers who need to use interstate services from public telephones."

[27] Alltel, pp. 3-4; Bell Atlantic, p. 9; Dial Page, pp. 7-8; GTE, pp. 6-8; In-Flight, pp. 6-8 (air-ground licensees should be exempted); McCaw, pp. 4-6; NABER, pp. 8-9; Nextel, pp. 13-16; OneComm, p. 10 (exempt SMR providers); Southern, p. 6; SBMS, pp. 10-16; WATERCOM, pp. 2-9 (exempt automated maritime telecommunications systems). In addition, CTIA (p. 7) states that certain services (rather than classes of CMRS providers) may, in appropriate circumstances, be exempted from Section 226.

tariff filing requirement of Section 226(h) and one other minor exception, there is no basis for the Commission to order such forbearance.[28]

None of the commenters supporting forbearance meets the three-prong test of Section 332(c). TOCSIA is, by definition, a consumer protection measure intended to protect consumers who make calls from "aggregator" telephones.[29] The statute provides such customers with essential information and assures them reasonable access to their carrier of choice.[30] Contrary to some commenters' assertions that TOCSIA only deals with "landline" or "wireline" telephones,[31] many of the problems consumers face

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[28] Bell Atlantic (p. 8), McCaw (p. 5) and others correctly state that imposition of the informational tariffing requirement of Section 226(h) would be inconsistent with the Commission's decision to forebear from the tariffing requirements of Section 203. GTE (p. 7) also argues that such compliance could be costly. See also OneComm, p. 10 (TOCSIA's most significant burden on OSPs is the informational tariff filing requirement). AT&T supports forbearance from this aspect of Section 226. AT&T also supports forbearance for CMRS OSPs from any requirement that OSPs must obtain an "800" or "950" number access code, because technical incompatibilities could make the use of such numbers infeasible in many situations (see In-Flight, p. 6).

[29] Aggregator telephones are telephones that are made available, in the ordinary course, to the public for casual use and without the need for a subscription.

[30] In-Flight (pp. 4-5) recognizes that access issues were one of the principal purposes underlying Congress' adoption of TOCSIA. See also Alltel, p. 3.

[31] E.g., Bell Atlantic, p. 8; Alltel, p. 3; Dial Page, p. 7; Nextel, p. 15; Alltel, p. 3; WATERCOM, p. 4.

with aggregator telephones are universal. Accordingly, forbearance from applying TOCSIA is inappropriate under the first prong of the forbearance test, because TOCSIA is necessary to prevent unreasonable practices by aggregators and CMRS OSPs. Forbearance is also inappropriate under the second prong of the test, because TOCSIA is necessary to protect consumers. Questions of cost and burden under the third prong of the test are thus irrelevant.[32]

Regardless of the placement of an aggregator telephone, or the technology used to access the public network from such phone, TOCSIA is necessary to protect consumers from unreasonable practices. Blocked aggregator telephones, i.e., phones that require callers to use the services of a single OSP, are the antithesis of competition. They are, in fact, "mini-monopolies" that preclude customer choice and restrict competition.[33] For example, customers who need to place a call from a public telephone located on an airplane or a train generally have no other options

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[32] All three prongs of the test must be met under Section 332(c). GTE (p. 6) is thus wrong that the cost/benefit analysis of the third prong of the test can, by itself, support forbearance. See also Bell Atlantic, p. 9; Alltel, p. 3; Dial Page, p. 8; In-Flight, p. 6; OneComm, p. 10.

[33] SBMS' assertion (p. 11) that there is competition among CMRS services thus does not apply in the case of blocked aggregator telephones.

available to them.[34] The restrictions in such situations are even greater than those affecting "landline" callers who may be able to walk to another telephone.[35] Similarly, aggregator telephones that allow customers access to other carriers but make such access unreasonably expensive compared to the service of the OSP selected by the phone's operator, impose severe limits on competition which, in turn, harm consumers. The requirements of TOCSIA are intended to eliminate just such inequities.

TOCSIA specifically requires aggregators to make their phones available on comparable terms to all OSPs. Thus, Section 226(c)(1)(B) and (e) provide that aggregators must allow callers to dial calls using 800 and 950 access codes and, when required by the Commission's Rules, using 10XXX equal access codes. In addition, Section 226(c)(1)(C), prohibits aggregators from imposing charges for using an access code that exceed the charges imposed for using the aggregator's preferred OSP. Contrary to some commenters' claims,[36] customers face access problems for

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[34] See WATERCOM (pp. 5-6), which expressly acknowledges that in the case of mobile aggregator telephones "the user does not have a choice of [wireless] carriers."

[35] Thus, contrary to Dial Page's assertion (p. 7), the consumer making an OSP call from a hotel or hospital is no more, and possibly less, of a "captive" than a consumer making a call from a mobile aggregator telephone.

[36] See, e.g., Alltel, p. 3.

operator services calls placed from mobile aggregator telephones just as from "landline" phones.

For example, even though GTE Airfone allows customers to place calls using (at least some) other carriers' access codes, it charges callers the same rate for connecting with their chosen OSP as it charges for completing the call to the terminating end using GTE Airfone's own operator service. Callers who exercise the right to select their own OSP must then pay that carrier's separate charges for completing the call from the OSP's ground facilities to the terminating end of the call. This practice creates a chilling effect on access code calling by making it prohibitively expensive, and therefore effectively unavailable, from airplanes served by GTE Airfone.[37] Moreover, this practice is inherently discriminatory and contrary to the express intent of Section 226(c)(1)(C).[38] Forbearance from applying TOCSIA would allow this situation to continue unabated and effectively eliminate any real OSP competition from airplanes served by GTE Airfone.

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[37] Knowing that its customers will be "double billed" for these calls, AT&T does not encourage its customers to dial access codes in such circumstances.

[38] See NPRM, n. 57, which cites the Common Carrier Bureau's "serious" concerns with this practice.

The fact that there may have been no customer complaints to date,[39] or that customers have not yet begun to dial access codes frequently from mobile aggregator telephones,[40] does not demonstrate that this practice is reasonable, nor does it support forbearance by the Commission. Indeed, such customer inaction is as easily attributable to the newness of the service and consumers' lack of specific knowledge about the Commission's goals for competition as it is to a lack of interest by callers.

Some commenters who seek forbearance argue that the marketplace already provides incentives for CMRS providers to fulfill the essential requirements of TOCSIA.[41] To the extent they are correct, however, no added costs would result from a Commission decision not to forbear. On the other hand, if carriers fail to provide consumers with the protections afforded by TOCSIA, the requirements of Section 332(c) would preclude forbearance.

Many of the asserted "impossibilities" of applying TOCSIA are also misstated. For example, GTE's claim (p. 7) that underlying CMRS providers "cannot enforce compliance with aggregator requirements" misstates OSPs' obligation

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[39] See e.g., GTE, p. 6; Alltel, p. 3; In-Flight, p. 5; McCaw, p. 4.

[40] In-Flight, p. 5.

[41] See, e.g., GTE, p. 6.

under TOCSIA.[42] If underlying CMRS providers "have no contractual or tariff relationship with [aggregators]" (id.), they have no TOCSIA duties. Similarly, GTE (pp. 7-8) and McCaw (p. 5) apparently misunderstand the "splashing" provisions of Section 226(b)(1)(H). No OSP is required to splash calls; rather, OSPs who choose to splash calls must follow the prescribed procedures. And even if it were true that a CMRS OSP would have to "brand" all calls on its network,[43] the decision of whether to provide OSP services remains solely with the CMRS provider itself.

In sum, the test prescribed by Section 332(c) precludes the Commission from forbearance with respect to all but the tariffing and OSP access code requirements of TOCSIA.

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[42] See also McCaw, p. 5.

[43] GTE, n. 13. GTE and SBMS (p. 13) are wrong, however, in asserting that all "underlying" wireless carriers would be required to brand or provide rates for calls. Only carriers that provide service directly to the customer (not carriers whose facilities happen to be used to complete a call) are properly categorized as OSPs and subject to TOCSIA's branding and rate information requirements.

CONCLUSION

For the reasons stated above and in AT&T's Comments, the Commission should adopt CMRS forbearance rules consistent with AT&T's proposals.

Respectfully submitted,

AT&T CORP.

By _____

Mark C. Rosenblum
Robert J. McKee
Richard H. Rubin

Its Attorneys

Room 3254A2
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-4481

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ATTACHMENT A

LIST OF COMMENTERS

ALLTEL Mobile Communications, Inc.("Alltel")
American Mobile Telecommunications Association, Inc. ("AMTA")
AT&T Corp. ("AT&T")
Bell Atlantic Mobile Systems, Inc. ("Bell Atlantic")
BellSouth
The Cellular Telecommunications Industry Association ("CTIA")
Dial Page, Inc. ("Dial Page")
E.F. Johnson Company ("Johnson")
Geotek Communications, Inc. ("Geotek")
GTE Service Corporation ("GTE")
Grand Broadcasting Corporation ("Grand")
In-Flight Phone Corporation ("In-Flight")
McCaw Cellular Communications, Inc. ("McCaw")
National Association of Business and Educational Radio, Inc. ("NABER")
Nextel Communications, Inc. ("Nextel")
NYNEX Corporation ("NYNEX")
OneComm Corporation ("OneComm")
Pacific Bell and Nevada Bell ("Pacific")
SEA, Inc.
The Southern Company ("Southern")
Southwestern Bell Mobile Systems, Inc. ("SBMS")
United States Sugar Corporation ("U.S. Sugar")
Utilities Telecommunications Counsel ("UTC")
Waterway Communications System, Inc. ("WATERCOM")
WJG Maritel Corporation ("Maritel")

CERTIFICATE OF SERVICE

I, Darlene Wroblewski, do hereby certify that on this 12th day of July, 1994, a copy of the foregoing Reply Comments of AT&T Corp. was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

Darlene Wroblewski

Attachment

Carolyn C. Hill
Federal Regulatory Counsel
Alltel Service Corporation
655 15th Street, N.W.
Suite 220
Washington, D.C. 20005

Alan R. Shark, President
American Mobile
Telecommunications Association,
Inc.
1150 18th Street, N.W.
Suite 250
Washington, D.C. 20036

Elizabeth R. Sachs, Esq.
Lukas, McGowan, Nace &
Gutierrez
1819 H Street, N.W., Suite 700
Washington, D.C. 20006
Attorneys for American Mobile
Telecommunications
Association, Inc.

John T. Scott, III
Charon J. Harris
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
Attorneys for Bell Atlantic
Mobile Systems, Inc.

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

Charles P. Featherstun
David G. Richards
1133 21st Street, N.W.
Washington, D.C. 20036
Attorneys for BellSouth Corp.
BellSouth Telecommunications,
Inc.
BellSouth Cellular Corp.
BellSouth Wireless, Inc.
Mobile Communications
Corporation of America

Andrea D. Williams
Michael F. Altschul
Cellular Telecommunications
Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Gerald S. McGowan
George L. Lyon, Jr.
Lukas, McGowan, Nace &
Gutierrez, Chartered
1819 H Street, NW, 7th Floor
Washington, D.C. 20006
Attorneys for Dial Page, Inc.

Russell H. Fox
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
Attorneys for E.F.
Johnson Co.

Michael S. Hirsch
Vice President
External Affairs
Geotek Communications, Inc.
1200 19th Street, N.W., #607
Washington, D.C. 20036

Gal L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
Attorney for GTE Service
Corp.

David A. Reams
President and General Counsel
Grand Broadcasting Corporation
P.O. Box 502
Perrysburg, Ohio 43552

William J. Gordon
V.P. Regulatory Affairs
In-Flight Phone Corp.
1146 19th Street, N.W.
Suite 200
Washington, D.C. 20036

Rodney L. Joyce
Ginsburg, Feldman and Bress
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for In-Flight Phone Corp.

Cathleen Massey
Senior Regulatory Counsel
McCaw Cellular Communications, Inc.
1150 Connecticut Ave., N.W.
4th Floor
Washington, D.C. 20036

David E. Weisman.
Alan S. Tilles
Meyer, Faller, Weisman and Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
Attorneys for National Association of Business and Educational Radio, Inc.

Robert S. Foosaner
Lawrence R. Krevor
Nextel Communications, Inc.
800 Connecticut Ave., N.W.
Suite 1001
Washington, D.C. 20006

Edward R. Wholl
Jacqueline E. Holmes Nethersole
NYNEX Corporation
120 Bloomingdale Road
White Plains, NY 10605

Michael R. Carper
Vice President and General Counsel
OneComm Corporation
4643 Ulster Street
Suite 500
Denver, CO 80237

James P. Tuthill
Jeffrey B. Thomas
140 New Montgomery St.,
Room 1522A
San Francisco, CA 94105

James L. Wurtz
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Attorneys for Pacific Bell and Nevada Bell

Thomas J. Keller
Verner, Liipfert, Bernhard McPherson and Hand, Chartered
901 Fifteenth St., N.W.
Suite 700
Washington, D.C. 20005-2327
Attorneys for Sea, Inc.

Carole C. Harris
Christine M. Gill
Tamara Y. Davis
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Attorneys for The Southern Company

Wayne Watts
Carol L. Tacker
Karen B. Peck
17330 Preston Road
Suite 100A
Dallas, TX 75252
Attorneys for Southwestern Bell Mobile Systems, Inc.

Wayne V. Black
Dorothy E. Cukier
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Attorneys for United States Sugar Corporation

Jeffrey L. Sheldon
Sean A. Stokes
Utilities Telecommunications Council
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20036

Martin W. Bercovici
Keller & Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Attorney for Waterway
Communications System, Inc.

Russell H. Rox
Susan H.R. Jones
Gardner, Carton & Douglas
1301 K. Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
Attorneys for WGJ Maritel
Corp.